Teguh Consolidated Sdn Bhd v Talam Corp Bhd (Malayan Banking Bhd, Third Party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-2140-1990
KAMALANATHAN RATNAM JC
18 JULY 1996

Civil Procedure *— Estoppel — By conduct — Failure of defendant to object at the hearing of plaintiff's application to amend statement of claim — Application to amend made after settlement of related actions — Failure of defendant to appeal against order allowing amendment — Defendant later applied to strike out plaintiff's claim on the ground that it was res judicata because of settlement reached in related actions — Whether defendant may now raise issue of res judicata against plaintiff's claim having not objected to the plaintiff's application to amend — Whether defendant estopped from raising res judicata*

The plaintiff/respondent who owned various pieces of land entered into a joint venture agreement ('the JVA') with the defendant/appellant to develop the said land. Pursuant to the JVA, the plaintiff/respondent transferred the said lands to the defendant/appellant in order for it to obtain a loan for the purpose of development and the defendant/appellant proceeded to charge the said lands to a third party, namely, Malayan Banking Bhd. Since the defendant/appellant failed to comply with its obligation under the JVA, the plaintiff/respondent gave notice to the defendant/appellant to terminate the JVA. By such a notice, the defendant/appellant was to redeem the said properties from the third party but it failed to do so. As a result, the plaintiff/respondent filed a suit against the defendant/appellant ('the D5 suit'). The plaintiff/respondent also commenced a suit against the third party ('the S2 suit'). The third party subsequently filed an interpleader summons ('the S4 suit'). Upon an application made in the S4 suit, an order was made on 29 October 1991 for a stay of the D5 suit and subsequently an order between the parties in the S4 and S2 suits dated 24 December 1993 was recorded. Thereafter the plaintiff/respondent in the D5 suit filed a summons for directions. The defendant/appellant then filed a notice under the summons for directions to apply to strike out the plaintiff/respondent's claim on the grounds that (i) it was scandalous, frivolous or vexatious; or that (ii) it was otherwise an abuse of the process of the court. The plaintiff/respondent later applied to amend its statement of claim and filed the amended statement of claim on 13 September 1995. The amended statement of defence and the reply were subsequently filed. On 30 October 1995, the senior assistant registrar ('the SAR') heard the notice to strike out the statement of claim and dismissed it. Hence this appeal by the defendant/appellant. The defendant/appellant argued that once the S2 suit was resolved by the court order on 24 December 1993, the plaintiff in the D5 suit was estopped from proceeding with the claim, reasons being (i) that the matters raised in the D5 suit were available in the S2 suit and that the S2 suit was settled by the order of court dated 24 December 1993; and (ii) that

A the court order dated 24 December 1993 had decided such matters between the plaintiff/respondent and the third party.

Held, dismissing the appeal:

Since the application to amend the statement of claim by the plaintiff/
B respondent was allowed and since there was no appeal against that order, the defendant/appellant was estopped by its own conduct from decrying the right of the plaintiff to proceed with the amended claim. By not appealing against the order allowing the amendment, the defendant was deemed to have accepted the court's decision on that issue as final. Therefore the prayers sought in the amended
C statement of claim could not be the subject of res judicata because in any event the defendant having failed to raise the issue of res judicata at the time the application for amendment was made, was estopped from now raising res judicata (see p 677D–G).

D **[Bahasa Malaysia summary**

Plaintif/penentang yang merupakan tuanpunya tanah bagi beberapa bidang tanah telah memasuki satu perjanjian usahasama ('PUS tersebut') dengan defendan/perayu untuk memajukan tanah-tanah tersebut. Menurut PUS tersebut, plaintif/penentang telah
E memindahkan tanah tersebut kepada defendan/perayu untuk membolehkannya mendapatkan pinjaman bagi tujuan pembinaan dan defendan/perayu seterusnya telah menggadaikan tanah tersebut kepada pihak ketiga iaitu Malayan Banking Bhd. Oleh kerana defendan/perayu telah gagal mematuhi kewajipan di bawah PUS tersebut, plaintif/penentang telah memberikan notis kepada defendan/
F perayu untuk menamatkan PUS tersebut. Dengan notis itu, defendan/perayu seharusnya menebus tanah tersebut dari pihak ketiga tetapi ia telah gagal berbuat demikian. Oleh yang demikian, plaintif/penentang telah memfailkan suatu guaman terhadap defendan/perayu pada 29 Disember 1990 ('guaman D5'). Plaintif/penentang juga telah
G memulakan satu guaman terhadap pihak ketiga ('guaman S2'). Pihak ketiga seterusnya telah memfailkan satu saman interplider ('guaman S4'). Berdasarkan suatu permohonan yang dibuat dalam guaman S4, suatu perintah telah dibuat pada 29 Oktober 1991 untuk suatu penggantungan guaman D5 dan seterusnya suatu perintah di antara pihak-pihak dalam guaman S4 dan S2 bertarikh 24 Disember 1993
H telah direkodkan. Kemudiannya plaintif/penentang dalam guaman D5 telah memfailkan satu saman minta arahan. Defendan/perayu telah memfailkan suatu notis di bawah saman minta arahan untuk membatalkan tuntutan plaintif/penentang atas dasar bahawa (i) ianya adalah menghinakan, remeh dan menyusahkan; dan (ii) ianya adalah
I penyalahgunaan proses mahkamah. Plaintif/penentang selepas itu telah memohon untuk meminda pernyataan tuntutannya dan telah memfailkan pernyataan tuntutan yang dipinda pada 13 September 1995. Pernyataan pembelaan yang dipinda dan jawapannya kemudiannya difailkan. Pada 30 Oktober 1995, penolong kanan

pendaftar ('PKP') telah mendengarkan notis untuk membatalkan pernyataan tuntutan dan telah menolaknya. Maka rayuan ini oleh defendan/perayu. Defendan/perayu telah menghujahkan bahawa sebaik sahaja guaman S2 diselesaikan melalui perintah mahkamah bertarikh 24 Disember 1993, maka plaintif dalam guaman D5 adalah diestopkan daripada meneruskan tindakan ini, alasannya adalah (i) bahawa perkara-perkara yang dibangkitkan dalam guaman D5 telah sedia ada dalam guaman S2, dan bahawa guaman S2 telah diselesaikan oleh perintah mahkamah bertarikh 24 Disember 1993; dan (ii) bahawa perintah mahkamah bertarikh 24 Disember 1993 telah memutuskan perkara-perkara tersebut di antara plaintif/penentang dan pihak ketiga.

Diputuskan, menolak rayuan itu:

Oleh kerana permohonan untuk meminda pernyataan tuntutan oleh plaintif/penentang telah dibenarkan dan memandangkan yang tidak ada rayuan terhadap perintah tersebut, maka defendan/perayu telah diestopkan oleh tindakannya sendiri daripada menafikan hak plaintif untuk meneruskan dengan tuntutan yang dipinda. Oleh kerana defendan/perayu telah gagal merayu tehadap perintah yang membenarkan pindaan tersebut, maka defendan/perayu dianggap sebagai menerima keputusan mahkamah atas isu itu sebagai muktamad. Maka permohonan yang dipohon dalam pernyataan tuntutan yang dipinda tidak boleh tertakluk kepada res judicata kerana dalam apa keadaan sekalipun setelah defendan/perayu gagal membangkitkan isu res judicata pada masa permohonan untuk pindaan itu dibuat, ianya sekarang diestopkan daripada membangkitkan perkara res judicata (lihat ms 677D–G).]

[*Editorial note*: The defendant/appellant's appeal to the Court of Appeal vide Civil Appeal No W02–184–96 was heard and dismissed.]

Notes

For cases on estoppel by conduct, see 2 *Mallal's Digest* (4th Ed 1994 Reissue), paras 2899–2908.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189

Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54

Greenhalgh v Mallard [1947] 2 All ER 255

Henderson v Henderson (1843) 3 Hare 100

Letang v Cooper [1965] 1 QB 232

Loh Holdings Sdn Bhd v Peglin Developments Sdn Bhd & Anor [1984] 2 MLJ 105

South American and Mexican Company, Re, ex p Bank of England [1895] 1 Ch 37

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581

Lee Hock Beng (*HB Lee & Co*) for the defendant/appellant.
V Ravindran (*Vazeer Akbar Majid & Co*) for the plaintiff/respondent.
Mohamed Zaini bin Mazlan (*Lee Hishammuddin*) for the third party.

Cur Adv Vult

Kamalanathan Ratnam JC:

Background facts

The plaintiff/respondent filed the present suit against the defendant/appellant on 29 December 1990 ('the D5 suit'). The plaintiff/respondent also commenced a suit against the third party on 6 January 1991 ('the S2 suit'). Subsequently the third party filed an interpleader summons on 28 February 1991 ('the S4 suit'). As a result of these three suits and upon an application made in the S4 suit, an order was made on 29 October 1991 for a stay of the D5 suit and subsequently an order between the parties in the S4 and S2 suits dated 24 December 1993 was recorded. It is proper for me to reproduce the said order:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)

SAMAN PEMULA NO S4–24–157 TAHUN 1991

Dalam Perkara Kaedah-Kaedah Mahkamah Tinggi 1980

DAN

Dalam Perkara mengenai permohonan oleh Malayan Banking Bhd untuk relief interplider terhadap tuntutan Teguh Consolidated Sdn Bhd dan Yata Development Sdn Bhd

ANTARA

Malayan Banking Bhd	Plaintif
DAN	
1 Teguh Consolidated Sdn Bhd	Defendan-
2 Yata Development Sdn Bhd	defendan

(MENURUT PERINTAH MAHKAMAH BERTARIKH 11 MAC 1992)

ANTARA

Teguh Consolidated Sdn Bhd	Plaintif

DAN

Yata Development Sdn Bhd	Defendan

MAHKAMAH TINGGI KUALA LUMPUR GUAMAN NO S2-22-56-91 A

DI HADAPAN YANG ARIF DATO DR VISU SINNADURAI
MAHKAMAH TINGGI KUALA LUMPUR
PADA 24 DISEMBER 1993 DALAM KAMAR

PERINTAH B

ATAS PERMOHONAN Teguh Consolidated Sdn Bhd DAN SETELAH MEMBACA saman dalam kamar bertarikh 18 November 1993 dan afidavit Tan Ah Tong yang diikrarkan pada 7 November 1993 DAN SETELAH C MENDENGAR En Lambert Rasaratnam, peguamcara Malayan Banking Bhd, En Jagjit Singh bersama dengan Cik Nora Hayati bte Ismayatim, peguamcara bagi Teguh Consolidated Sdn Bhd, dan En Amir, peguamcara bagi Yata Development Sdn Bhd MAKA DENGAN PERSETUJUAN ADALAH DIPERINTAHKAN seperti berikut:

1 Bahawa Malayan Banking Bhd memulangkan tertakluk kepada D perenggan keenam (6) di bawah, hak milik tanah sebanyak 2,215 (Title Deed) bagi tanah tersebut yang terletak di Mukim Kepis, Kuala Pilah, Negeri Sembilan sebagaimana yang tercatat di dalam jadual yang dilampirkan bersama saman dalam kamar bertarikh 18 November 1993 yang sekarang berada di dalam milik dan jagaan Malayan Banking Bhd kepada Teguh Consolidated Sdn Bhd bersama dengan pelepasan gadaian E yang sah dan boleh didaftarkan dengan gadaian pendua;

2 Teguh Consolidated Sdn Bhd akan mendepositkan jumlah RM480,000 di dalam akaun simpanan tetap (fixed deposit) dengan Bank of Commerce Bhd yang akan dipegang sebagai amanah oleh Tetuan Mohamed Saleh & Associates sehingga kes di antara Teguh Consolidated Sdn Bhd dan Yata Development Sdn Bhd didengar dan diputuskan F dan sesalinan fixed deposit resit diberikan kepada peguamcara Yata Development Sdn Bhd;

3 Guaman No S2-22-56-1991 Mahkamah Tinggi, Kuala Lumpur akan dibuang tanpa perintah kepada kos;

4 Teguh Consolidated Sdn Bhd akan membayar jumlah RM5,000 kepada Malayan Banking Bhd sebagai kos di antara parti dengan parti; G

5 Teguh Consolidated Sdn Bhd juga akan membayar jumlah RM2,500 kepada Malayan Banking Bhd dengan pembayaran pendahuluan bagi pihak Yata Development Sdn Bhd sebagai kos di antara parti dengan parti dan jumlah tersebut akan dipulangkan oleh Yata Development Sdn Bhd kepada Teguh Consolidated Sdn Bhd di dalam keadaan di H mana jika sekiranya guaman ini diputuskan menyebelahi Teguh Consolidated Sdn Bhd;

6 Malayan Banking Bhd akan memulangkan hak milik tanah sebanyak 2,215 tersebut setelah pembayaran kos sebanyak RM7,500 yang dipersetujui kepada Malayan Banking Bhd oleh Teguh Consolidated Sdn Bhd dan Yata Development Sdn Bhd; I

7 Setelah hak milik sebanyak 2,215 dipulangkan kepada Teguh Consolidated Sdn Bhd kedua-dua pihak iaitu Teguh Consolidated Sdn Bhd dan Yata Development Sdn Bhd tidak mempunyai apa-apa tuntutan lanjut lagi terhadap Malayan Banking Bhd;

A 8 Setelah perenggan kedua (2) dan kelima (5) dipatuhi dalam masa tujuh (7) hari daripada tarikh pematuhan tersebut Yata Development Sdn Bhd akan melaksanakan dan memberikan kepada Teguh Consolidated Sdn Bhd notis penarikan balik kaveat persendirian terhadap sebahagian hak milik tanah sebanyak 2,215 tersebut;

B 9 Malayan Banking Bhd setelah memberikan hak milik tanah 2,215 tersebut dan pelepasan gadaian dan juga salinan pendua gadaian tersebut akan tidak mempunyai apa-apa tuntutan dalam apa jua sekali pun atau dijadikan pihak di dalam prosiding di antara Teguh Consolidated Sdn Bhd dan Yata Development Sdn Bhd.

Bertarikh pada 24 Disember 1993.

C

Salinan diakui sah
tt

.....
Puan Aslina Bte Joned
D Timbalan Pendaftar
Mahkamah Tinggi, Kuala Lumpur
Bertarikh 26 Januari 1994

Perintah ini telah difailkan oleh Tetuan Mohamed Saleh & Associates, peguamcara bagi pihak Teguh Consolidated Sdn Bhd yang beralamat di No 21, First Floor, Jalan 1/76, Desa Pandan, Off Jalan Kampung Pandan,
E 55100 Kuala Lumpur.

Thereafter the plaintiff/respondent in the D5 suit filed a summons for directions on 23 February 1995. The defendant/appellant then pursuant to O 25 r 7 of the Rules of the High Cout 1980 and in reliance on Form 47 filed a notice under summons for directions on 21 March 1995 ('the
F notice') which was to apply to strike out the plaintiff/respondent's claim, during the hearing of the summons for directions, on the grounds that:

(1) it was scandalous, frivolous or vexatious; or

(2) it was otherwise an abuse of the process of the court.

G There were other issues also raised before the learned senior assistant registrar ('the SAR') on the hearing of the summons for directions, but they were never pursued.

The plaintiff/respondent's claim under D5

H The plaintiff/respondent owned various pieces of land. With a view to developing the said land into a housing development called Taman Muhibbah the plaintiff/respondent entered into a joint-venture agreement ('the JVA') with the defendant/appellant on 18 December 1987. As a term of the JVA the plaintiff/respondent transferred the titles to the various pieces of land to the defendant/appellant to enable the defendant/appellant
I to obtain loans for the development of the housing project. The defendant/appellant proceeded to charge the said title to the various pieces of land to the third party. Since the defendant/appellant had failed to comply with its obligations under the JVA and pursuant to cl 11(e) of the JVA the plaintiff/

respondent gave notice to the defendant/appellant on 4 October 1988 and terminated the JVA. Clause 11(e)(i) and (ii) of the JVA read as follows: A

(i) all monies due from one party to the other party under the terms of this agreement shall be duly paid within fourteen (14) days from the date of such termination;

(ii) within fourteen (14) days from the date of such termination both parties are to redeem respectively the documents of title to the said land or part thereof which have been pledged to the said bank for their respective working capital; B

Since the defendant/appellant had failed to redeem the titles, the plaintiff/respondent prayed for an order that the defendant/appellant do redeem the said titles from the third party and return the said titles to the plaintiff/respondent, for damages for breach of contract, and for any further relief and costs. C

The defendant/appellant's notice to strike out the claim D

In support of the notice, one Lim Mei Yoong, the company secretary of the defendant/appellant affirmed an affidavit on 21 March 1995 (encl 21) wherein she reverted to various clauses in the agreement. Pursuant to cl 6 the defendant/appellant had the discretion to enter into financing facility with a bank 'on such terms and conditions as Talam deem fit'. Pursuant to cl 3 the plaintiff/respondent covenanted to ratify whatsoever the defendant/appellant shall lawfully do in the name of the plaintiff/respondent and pursuant to cl 11(e)(ii), both the plaintiff/respondent and the defendant/appellant were to redeem the documents of titles to the pieces of land from the bank. The defendant/appellant further averred that other than the notice of termination there were no other complaints, oral or in writing, from the plaintiff/respondent to the defendant/appellant of any breach of any of the terms of the JVA. Further the defendant/appellant wrote on 7 December 1990 to the plaintiff/respondent that it was settling all its outstanding accounts with the third party and would be redeeming the properties deposited with it. There was no response from the plaintiff/respondent to the said letter. Although the defendant/appellant had settled the debts to the third party, the latter was unable to hand over the title deeds by reason of a claim to the said documents by one Yata Development Sdn Bhd ('Yata') because the plaintiff had agreed to deposit the titles to the said lands with Yata in consideration for a loan of RM401,576.48 from Yata. This fact was never denied by the plaintiff/respondent in their reply although it was contended by the plaintiff/respondent that the third party was not a party to any transaction between the plaintiff/respondent and Yata. The defendant/appellant then relied on the terms of settlement recorded on 24 December 1993 and contended that the plaintiff/respondent's claim against the defendant/appellant in so far as it pertains to the loan facility from the third party to the defendant/appellant and the redemption of the titles was clearly unsustainable. E F G H I

In reply to encl 21, the director of the plaintiff/respondent, namely, Tan Ah Tong, affirmed an affidavit dated 4 April 1995 (encl 22). Having

A confirmed that the plaintiff/respondent had indeed deposited the document of titles to the various pieces of land with the defendant/appellant pursuant to the JVA and that the defendant/appellant had in turn charged the said documents of title to the third party, the plaintiff/respondent contended that this was done by the defendant/appellant not for the purpose outlined in the JVA but for its own purposes and thus had committed a fraud on the B plaintiff/respondent. Based on a copy of a letter written by the defendant/appellant to Bank Negara Malaysia dated 21 September 1988 and exhibited to his affidavit as exh TAT6, the plaintiff/respondent contended that the defendant/appellant had in fact charged the said titles to the various pieces of land in order to 'top up' its existing overdraft facility with the third party for C purposes other than their project pursuant to the JVA. The plaintiff/respondent also averred that the third party had refused to return the said titles on the ground that the defendant/appellant's overdraft facility with the third party was still outstanding and that it was only some time on or about February 1991 that the defendant/appellant settled the overdraft facility. In the circumstances the plaintiff/respondent contended that it was wrongfully deprived of the titles D to the land for a period in excess of three years and was thus prevented from using the land for the plaintiff/respondent's purposes including the development thereof and had thus suffered loss and damages. Whilst conceding that some of the allegations had not been included in the statement of claim the plaintiff/respondent averred that it would be amending the same. The plaintiff/E respondent then applied to amend the statement of claim by way of encl 23 and obtained order in terms on 7 September 1995. The amended statement of claim was filed on 13 September 1995 and the amended defence on 29 September 1995 and the reply on 13 October 1995.

On 30 October 1995 the learned SAR finally heard the notice to F strike out the statement of claim. As a result of the amended statement of claim, the SAR when hearing the said notice to strike out, allowed an oral amendment to the defendant/appellant's notice to state simply that it was an application to strike out the plaintiff/respondent's amended statement of claim on the same two grounds stated earlier. The SAR after hearing arguments dismissed the said notice to strike out the statement of claim. G Hence this appeal before me by the defendant/appellant.

The defendant/appellant's case

The defendant/appellant submitted that in a nutshell and taking into consideration the facts relied upon by the plaintiff/respondent, the essential H facts on which the plaintiff/rspondent based its claim as gathered from the amended statement of claim (encl 25) are as follows:

(1) that there was a JVA between the plaintiff/respondent and defendant/appellant to develop a project known as Taman Muhibbah;

(2) that the plaintiff/respondent deposited title deeds of various properties I with the defendant/appellant to enable the defendant to charge the same to the third party for financing of the project;

(3) that the plaintiff/respondent terminated the JVA;

(4) that there was failure by the defendant/appellant to obtain the drawdown on the loan obtained from the third party;

(5) that there was a delay in obtaining the redemption of the title deeds to the various properties in time; A

(6) that the defendant/appellant had utilized the securities for purposes other than the said project.

From the above facts the defendant/appellant submitted that the plaintiff/respondent's case is based on fraud and in breach of contract. It was submitted that the defendant/appellant's right to sieve the causes of action from the facts as presented by the plaintiff/respondent arose from a decision of the Court of Appeal in *Letang v Cooper* [1965] 1 QB 232 which held that a cause of action is simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The defendant/appellant further summarized the plaintiff/respondent's case as relating mainly to: B C

(1) the loan applied for by the defendant/appellant from the third party; and

(2) that the title deeds were not redeemed in time.

The defendant/appellant then compared the facts of the present case ('the D5 suit') to the facts in the S2 suit, ie the plaintiff/respondent's claim as against the third party. The essential facts of the S2 suit are as follows: D

(1) that there was a JVA between the plaintiff/respondent and the defendant/appellant to develop a housing project known as Taman Muhibbah; E

(2) that the plaintiff/respondent provided the land securities to the third party to enable a loan to be raised by the defendant/appellant with the third party;

(3) that the third party refused to provide the drawdown of the loan. F

The above facts constituted the factual situation to base the cause of action in contract. Again it was submitted that the plaintiff/respondent's claim was in relation mainly to:

(1) the loan; and

(2) the title deeds. G

On 24 December 1993 the third party obtained an order of court, details of which have been reproduced earlier, which said order resolved the S2 suit and the subject matter of the title deeds.

Subsequently another order of court dated 24 March 1993 between the plaintiff/respondent, the third party and Yata settled the following issues namely that: H

(1) the S2 suit be dismissed with no order as to costs;

(2) the plaintiff/respondent do pay various legal costs to the third party;

(3) the third party is to return the title deeds of the various pieces of land (the subject matter of the D5 suit) to the plaintiff/respondent; I

(4) the plaintiff/respondent and Yata have no further claims whatsoever against the third party.

Based on the above orders the defendant/appellant herein argues that the plaintiff/respondent is caught by res judicata. In expanding their argument on res judicata the defendant/appellant relied on the now famous dicta of Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 wherein his Lordship said at p 115:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation ... . The plea of res judicata applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation ... .

The Vice Chancellor's phrase 'every point which properly belonged to the subject of litigation' was expanded in *Greenhalgh v Mallard* [1947] 2 All ER 255 by Sommervell LJ at p 257:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

Within our shores the Federal Court held in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 that when a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel *per rem judicatum* has been created as a result. The Federal Court further held that there are two kinds of estoppel *per rem judicatum*, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

The defendant/appellant thus submitted that once the S2 suit was resolved by a court order on 24 December 1993 the plaintiff/respondent in this D5 suit was estopped from proceeding for two reasons:

(1) that the matters raised in the present action clearly belonged to or were available for litigation in the S2 suit and that since the S2 suit was settled by the order of court dated 24 December 1993 the present S5 action is an attempt by the plaintiff/respondent to relitigate the facts or issues arising from the S2 suit;

(2) that the court order of 24 December 1993 had decided such matters between the plaintiff/respondent and the third party.

It was the defendant/appellant's submission that the essential facts of the S5 and the S2 suits are substantially the same as stated earlier and that the defendant/appellant's liability to the plaintiff/respondent with regard to the loan applied for in which the land titles belonging to the plaintiff/respondent were utilized as agreed under the JVA and the defendant/appellant's liability to redeem the land titles, are issues very relevant to the S2 suit. The defendant/appellant further submitted that the court order dated 24 December 1993 had determined all matters between the plaintiff/respondent and the third party with regard to the loan and the land titles. The present action is in fact re-opening the issue between the plaintiff/respondent and the third party particularly where the third party is considered in law as a defendant/appellant and an opposite party. For the above reasons the defendant/appellant prayed that the plaintiff/respondent's claim be struck out with costs and alternatively its claim arising from the land titles be estopped.

The plaintiff/respondent's case

The plaintiff/respondent submitted that its cause of action arose when the defendant/appellant committed fraud against the plaintiff/respondent where the defendant/appellant had utilized the titles for an already existing overdraft account with the third party and that it was to be used to top up that already existing account and for purposes other than that agreed to in the JVA. The plaintiff gave details of the alleged fraud. It was further alleged by the plaintiff/respondent that the defendant had failed to fulfil its obligations under the said JVA in that the defendant had failed to obtain the necessary funds for the development of the project, and had failed to manage the project resulting in it not being commenced. The plaintiff/respondent claimed for loss suffered as a result of the plaintiff/respondent being deprived of the titles and from being prevented from utilizing the titles for any other development as a result of the fraud and breach of contract committed by the defendant/appellant.

The plaintiff/respondent submitted that in respect of the S2 suit the cause of action was the failure of the third party to return the titles and that the said titles contained restriction in interest and that since the restriction in interest had not been complied with the plaintiff/respondent prayed for an order that the charges be held null and void. However these differed from the cause of action in the present suit which was based on fraud, details of which had been enumerated earlier and also on a claim for loss and damages accruing for being deprived of having the opportunity of utilizing the titles for any other development.

With reference to the decision of the Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, the plaintiff/respondent submitted that the doctrine of res judicata was not applicable as not only were the parties in the present D5 suit and the S2 suit different, the cause of action in the present D5 suit was based on breach of contract and fraud whereas in the S2 suit the cause of action was for a declaration that the charge was null and void. The plaintiff/respondent referred me to *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ

105, FC, where the then Federal Court held that the doctrine of res judicata should not be applied where the cause of action and the issues were different.

In respect of the order dated 27 October 1991 calling for a stay of all further proceedings in the D5 suit, it was submitted that the order related to the redemption and discharge of the said titles and discharge of the charge. The order for stay, it was argued, did not operate to stay the whole proceedings and that the order was granted to assist and expedite the third party interpleader summons.

It was further submitted that the order dated 24 December 1995 was a consent order in respect of an interpleader summons wherein the defendant/appellant was not a party and which disposed of the D2 suit and which therefore only bound the parties thereto.

The third party's case

The court invited the third party to submit giving its views on the appeal. The third party thus addressed its mind to two issues, namely whether a consent judgment can give rise to a claim of estoppel and secondly whether issue estoppel or cause of action estoppel can arise in a subsequent action between parties who were not directly involved in the initial action which is said to give rise to the claim of issue estoppel and cause of estoppel.

I was referred to *Re South American and Mexican Company, ex p Bank of England* [1895] 1 Ch 37 to support the proposition that a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which resulted from a decision of the court after the matter has been fought out to the end. With regard to the second issue the third party referred me to *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581. The question that arose for consideration by the Privy Council was whether the second respondent Choi Kee Ltd who were not a party to the first action between *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* could raise the question of estoppel based on the decision of the court in the action between *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* in a subsequent action brought by Yat Tung Investment Co Ltd against Dao Heng Bank Ltd and Choi Kee Ltd.

The question was answered by the Privy Council in the affirmative. The third party submitted that for the doctrine of estoppel to be available to a non-party to an original action it must be established that there exists privity between the non-party to the original action and a party to the original action and relied on *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54.

The court's findings

I find that the order of the learned SAR dated 7 September 1995 is very relevant to the issues raised by the parties and as such I shall reproduce the said order:

DI DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
GUAMAN NO D5-22-2140-90

ANTARA

Teguh Consolidated Sdn Bhd — Plaintif

DAN

Talam Corporation Bhd — Defendan

DAN

Malayan Banking Bhd — PARTY KETIGA

DI HADAPAN PENOLONG KANAN PENDAFTAR
TUAN SUHAIMI BIN IBRAHIM
PADA 7 SEPTEMBER 1995

PERINTAH

ATAS PERMOHONAN pihak plaintif yang dinamakan di atas, DAN SETELAH MEMBACA notis meminta arahan lanjutan yang bertarikh 6 April 1995 dan afidavit Tan Ah Tong yang diikrarkan pada 4 April 1995, kedua-duanya difailkan disini DAN SETELAH MENDENGAR En Malik Imtiaz peguamcara bagi pihak plaintif dan En Lee Hock Beng peguamcara bagi pihak defendan dan En Ahmad Rizwan peguamcara bagi pihak ketiga MAKA ADALAH DIPERINTAHKAN bahawa pernyataan tuntutan dipinda sebagaimana ditunjukkan di dalam lampiran A dan bahawa pernyataan tuntutan tersebut diserahkan kepada peguamcara defendan di dalam masa empat belas (14) hari dari tarikh perintah di dalam ini dan bahawa defendan diberi kebenaran memfailkan dan menyerahkan pembelaan dan tuntutan balas terpinda, sekiranya perlu, dalam masa empat belas (14) hari dari tarikh menyerahkan pernyataan tuntutan terpinda tersebut dan bahawa plaintif diberi kebenaran memfailkan dan menyerahkan jawapan dan pembelaan terpinda jika perlu, kepada tuntutan balas terpinda dalam masa 14 hari dari tarikh penyerahan pembelaan dan tuntutan balas terpinda ke atas plaintif DAN ADALAH DIPERINTAHKAN bahawa kos permohonan ini dibayar oleh pihak plaintif.

Bertarikh pada 7 haribulan September 1995.

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Suhaimi bin Ibrahim
Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

Perintah ini difailkan oleh Tetuan Vazeer Akbar Majid & Co, Peguambela dan Peguamcara, peguamcara bagi pihak plaintif yang mempunyai alamat

untuk penyampaian di No 261-1, Jalan Tun Sambanthan, 50470 Kuala Lumpur. Tel 03-2735150; Fax: 03-2735170; BC Box 427. [Ruj: 1345]

It is clear that the order giving leave to amend the statement of claim was made long after the order dated 24 December 1993 was made.

Various affidavits were affirmed in support of and against the notice to strike out the claim. In encl 22 the plaintiff/respondent averred in para 18 as follows:

> 18 By reason of the foregoing, the plaintiff was wrongfully deprived of the titles to the lands for a period in excess of three years and was thus prevented from using the lands for the plaintiff's purposes including the development thereof and has hereby suffered loss and damage.

In para 20 the plaintiff/respondent averred that since some of the allegations made had not been included in the statement of claim the plaintiff/respondent stated that they would file an application to amend the statement of claim.

Since the application to amend was allowed and there was no appeal against that order it seems to me that the defendant/appellant is now estopped by its own conduct from decrying the right of the plaintiff/respondent to proceed with the amended claim. The plaintiff/respondent has alleged fraud on the part of the defendant/appellant in utilizing the titles for an already existing overdraft account with the third party and that it was to be used to top up that already existing account and for purposes other than that agreed to in the JVA and have enumerated details of the alleged fraud. The plaintiff/respondent's amended claim was for damages for being deprived of the titles and from being prevented from utilizing the titles for any other development. By not appealing against the order allowing for amendment the defendant/appellant is deemed to have accepted the court's decision in that issue as final. Therefore the prayers sought in the amended statement of claim cannot be the subject of res judicata because in any event the defendant having failed to raise the issue of res judicata at the time the application for amendment was made, is estopped from now raising res judicata.

I therefore dismissed the appeal with costs.

Appeal dismissed.

Reported by Ng Kian Pin